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EMPLOYMENT AT WILL: JUST CAUSE PROTECTION THROUGH MANDATORY ARBITRATION

Wrongful termination litigation is a growth industry; it has been referred to as "the labor law issue of the 80's."¹ Employees are becoming increasingly inventive in finding ways to sue their employers for wrongful termination, and courts are becoming increasingly receptive to these claims.² Before courts eliminate the doctrine of employment at will, however, courts should consider the needs and interests of employees, employers and society as a whole.³

Employees' primary interest in wrongful termination litigation is job security.⁴ Job security has many meanings. It may imply a tenure system with discharge for exceptional circumstances only. On the other hand, it may refer to a limited training and transfer system for reassigning displaced employees. The question is what type of "security" the average employee needs.

Employers, by contrast, are primarily interested in management freedom.⁵ Restricting management's freedom to terminate employees affects the employer by increasing costs and reducing productivity. Productivity is reduced when management retains incompetent or unnecessary employees for fear of litigation. Costs are increased through both litigation and remedial costs. Moreover, society has an interest in minimizing, to the extent possible, the costs of resolving wrongful termination disputes.

When balancing these interests, two questions arise: What restrictions, if any, should be placed on an employer's right to determine its workforce, and what forum, judicial or administrative, is appropriate to enforce these limitations? Courts and commentators generally agree that an employer

1. Lopatka, *The Emerging Law of Wrongful Discharge—A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 BUS. LAW. 1 (1984). There were 229 state and federal employment at will decisions reported in 1984. *Individual Rights and Responsibilities in the Work Place*, 1 LAB. LAW. 777, 785 (hereinafter *Committee Report*).

2. See *infra* notes 20–55 and accompanying text for the development of wrongful termination doctrine.

3. See, e.g., Catler, *The Case Against Proposals to Eliminate the Employment at Will Rule*, 5 INDUS. REL. L.J. 471 (1983); Note, *Limiting the Right to Terminate at Will—Have the Courts Forgotten the Employer?*, 35 VAND. L. REV. 201 (1982).

4. The concept of job security figures prominently in numerous employment at will cases. See, e.g., *Thompson v. St. Regis Paper Co.*, 102 Wn. 2d 219, 685 P.2d 1081 (1984) (creating an atmosphere of job security implies an obligation to terminate only for cause); *Pine River State Bank v. Mettelle*, 333 N.W.2d 622 (Minn. 1983) (employee expectations of job security creates an implied employment contract); see also *Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

5. See Catler, *supra* note 3; Note, *supra* note 3.

should not have unfettered discretion to terminate an employee.⁶ Indeed, in forty-one states, courts have adopted some restriction governing the discharge of employees.⁷ By contrast, the question of the appropriate enforcement mechanism remains unresolved, and is, therefore, the focus of this Comment. For both theoretical and practical reasons, a judicial approach to wrongful termination is inappropriate. Instead, a statutory guarantee of termination only for cause, coupled with an administrative system of enforcement, can better balance the competing concerns. Such a scheme would benefit both employers and employees. Finally, Washington should adopt such an administrative system.

I. THE LAW OF EMPLOYMENT AT WILL

A. *Historical Development*

Until the late 19th century, an employee hired for an indefinite term was presumed to be hired for one year, with the employment contract renewable annually by the parties.⁸ At that time, virtually all American courts adopted the presumption that an employee hired for an indefinite term was employed at will and could be terminated "for good cause, for no cause, or even for cause morally wrong."⁹ This presumption was adopted by the Washington Supreme Court and virtually every other jurisdiction.¹⁰

The traditional rule of employment at will was derived from the doctrine of complete freedom of contract.¹¹ When an employer hired an employee, the parties formed a contract to exchange labor for wages. The employee gave no consideration in addition to labor to support any promise of continued employment made by the employer. Even if an employer promised to terminate only for cause, that promise was unenforceable since it was not supported by consideration. Accordingly, employment was "at

6. See Blades, *supra* note 4; Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

7. See Strasser, *Employment at Will: The Death of a Doctrine?*, Nat'l L.J., Jan. 20, 1986, at 1, col. 2 (list of each state and exception recognized); see also Wald & Wolf, *Recent Developments in the Law of Employment at Will*, 1 LAB. LAW. 533, 555-80 (state by state survey summarizing key cases in each state).

8. The presumption of a one year employment agreement was borrowed from the common law of England at the time. See, e.g., *Davis v. Gorton*, 16 N.Y. 255 (1857).

9. *Payne v. Railroad Co.*, 81 Tenn. 507 (1884), *overruled on other grounds*, *Hutton v. Waters*, 132 Tenn. 527, 179 S.W. 134, 138 (1915); see also W. HOLLOWAY & M. LEECH, *EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES* 1-42 (1985).

10. *Davidson v. Mackell-Paine Veneer Co.*, 149 Wash. 685, 271 P. 878 (1928). New York, for example, replaced the one year presumption with an at will presumption in *Martin v. New York Life Ins. Co.*, 148 N.Y. 117, 42 N.E. 416 (1895).

11. See Comment, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1825 (1980).

will.” Employers and employees could bargain for a definite term of employment, provided that their express employment agreement was supported by consideration in addition to the contemplated services.¹²

This rule acknowledged the political power of business interests in the late 19th century.¹³ It seemed entirely logical in an economy where most employment relationships were short-term and wages were not a large share of national income.

As the economy became more industrialized, regulation proved necessary to check the abuse of business power.¹⁴ Congress enacted statutes prohibiting employers from terminating employees for engaging in certain specified conduct.¹⁵ As other abuses were recognized, such as discrimination based on race or sex, Congress further regulated an employer’s relationship with its employees.¹⁶ These statutes are all based on group conduct and protect only identified groups. Union supporters, women, and racial minorities were protected, not as individuals, but as group members. If an individual employee did not belong to a protected group, the employee could be terminated for any reason whatsoever.

Recently, courts have sharply limited the freedom of employers to terminate employees at will. The California Court of Appeals, in 1959, was the first court to impose such limitations.¹⁷ Since that time, the judicially-created exceptions have, in some jurisdictions, almost swallowed the traditional rule.¹⁸ These exceptions have generally taken three forms: public policy (tort), contract, and an implied covenant of good faith and fair dealing.¹⁹

12. Under the at will doctrine, “[t]he employee must have a contract that fulfills the requirement of additional consideration or it will not be enforced.” W. HOLLOWAY & M. LEECH, *supra* note 9, at 47. For a discussion of the circumstances where this additional consideration requirement was met and a collection of cases, see *id.* at 47–50.

13. See Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 UMKC L. REV. 189, 191 (1983).

14. *Id.*

15. See, e.g., Labor Management Relations Act, 29 U.S.C. §158(a)(3)(1982) (discharge for union or protected concerted activities unlawful) [hereinafter NLRA]; Federal Labor Standards Act, 29 U.S.C. § 215(a)(3) (1982) (discharge for invoking provisions of the Act unlawful).

16. See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000–2002(a) (1982) (discharge for race or sex unlawful); Age Discrimination in Employment Act of 1970, 29 U.S.C. § 623(a)(1) (1982) (discharge based on age unlawful).

17. *Petermann v. Local 396, Int’l Bhd. of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (discharge when employee refused to commit perjury wrongful).

18. Murg, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C.L. REV. 329 (1982).

19. This Comment sets forth the general doctrine of employment at will to support the basic analysis: developing an alternate system to resolve wrongful termination disputes. A detailed examination of the doctrine surrounding each exception to employment at will is beyond the scope of this Comment and may be found in several other commentaries. See generally, Lopatka, *supra* note 1; W. HOLLOWAY & M. LEECH, *supra* note 9; Murg, *supra* note 18.

B. Exceptions to the Traditional Rule

1. Public Policy Theories

The public policy exception is the oldest and most widely recognized exception to the traditional rule of employment at will.²⁰ Under this exception, courts recognize an action for wrongful termination when an employee is terminated for a reason that violates public policy.²¹ The exception covers three situations: where the employee is terminated for refusing to commit an unlawful act;²² where the employee is terminated for acting in the recognized public interest;²³ and where the employee is terminated for exercising a legal right.²⁴

In *Thompson v. St. Regis Paper Co.*,²⁵ the Washington Supreme Court adopted the public policy exception to employment at will.²⁶ To state a claim, an employee must plead and prove that the discharge violated an explicit judicially or legislatively recognized public policy.²⁷ The burden then shifts to the employer to prove that the discharge was motivated for reasons other than those claimed by the employee.²⁸

In adopting this exception, the *Thompson* court left many questions unanswered. First, what constitutes public policy? Next, is an employee's action or inaction to be judged subjectively, objectively, or by the law applicable to the employee's conduct? What is the result when the employer, wrongfully, but in good faith, believes that the requested act is lawful? These, among other concerns, were not addressed by the *Thompson* court.

20. *Committee Report*, *supra* note 1.

21. For a general discussion of the public policy approach, see Wald & Wolf, *supra* note 7, at 335-41 (survey of 1984 decisions on public policy exception).

22. See, e.g., *Delaney v. Taco Time Int'l Inc.*, 297 Or. 10, 681 P.2d 114 (1984) (refusal to libel former co-worker); *Trombetta v. Detroit, Toledo & Ironton R.R. Co.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978) (refusal to alter pollution control records).

23. See, e.g., *Bueth v. Britt Airlines, Inc.*, 749 F.2d 1235 (7th Cir.), *appeal after remand*, 787 F.2d 1194 (1984) (refusing to fly airplane considered unsafe); *Palmateer v. International Harvester*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (assisting in police investigation).

24. See, e.g., *DeLaCruz v. Pruitt*, 590 F. Supp. 1296 (N.D. Ind. 1984) (expressing political beliefs); *Kelsay v. Motorola, Inc.* 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (filing a workman's compensation claim).

25. 102 Wn. 2d 219, 685 P.2d 1081 (1984). For a brief commentary on the *Thompson* decision, see Note, *Three New Exceptions to the Employment At Will Doctrine*, 60 WASH. L. REV. 209 (1984).

26. *Thompson*, 102 Wn. 2d at 232, 685 P.2d at 1089.

27. *Id.*

28. *Id.* at 232-33, 685 P.2d at 1089.

2. Contract Theories

The contract exception to the traditional rule binds an employer to promises made to employees.²⁹ This exception avoids the traditional rule in one of two ways. First, the court may relax or eliminate the traditional consideration requirement.³⁰ Alternately, the court may use promissory estoppel to bind employers to promises which justifiably induce reliance by employees.³¹ Under either theory, contract rights are created in the employee based on a promise or course of conduct by the employer.

The relaxed consideration approach draws largely on *Toussaint v. Blue Cross & Blue Shield*.³² In *Toussaint*, the Michigan Supreme Court held that unilateral statements of employer policy created contract rights for the employee despite the absence of consideration or mutuality of obligation.³³ The court replaced the traditional contract analysis with a pragmatic examination of the workplace. As the court noted, employees generally lack the bargaining power to make detailed employment contracts.³⁴ Instead, most employees accept the conditions of employment specified by the employer, and rely on the employer to honor the conditions established.³⁵ When the employer promises to place limits on its discretion to terminate employees, the practical realities of the workplace require that the promise be enforced.

This relaxed consideration approach has been well-received in many state courts.³⁶ Following *Toussaint*, binding employment contracts may be implied from statements in employee handbooks,³⁷ promises made in employment interviews,³⁸ statements in stock option plans,³⁹ and many

29. For a general discussion of the contract exception, see Wald & Wolf, *supra* note 7 at 555–79 (survey of 1984 decisions on contract exception).

30. See *infra* notes 32–44 and accompanying text.

31. See *infra* notes 45–48 and accompanying text. While the relaxed consideration and promissory estoppel concepts are analytically separate, both courts and commentators treat them together under the general rubric of the implied contract exception. Accordingly, they will be treated together in this Comment as well.

32. 408 Mich. 579, 292 N.W.2d 880 (1980).

33. *Id.* at 892.

34. *Id.*

35. *Id.*

36. The implied contract exception has been adopted in 31 states. Strasser, *supra* note 7, at 6.

37. A breach of contract claim based on statements in an employee handbook was made in 38 cases during 1984 and plaintiffs reached the jury in 18 cases. *Committee Report, supra* note 1, at 785–86. Successful claims include: *Wolk v. Saks Fifth Ave.*, 728 F.2d 221 (3d Cir. 1984); *Liekvold v. Valley View Community Hosp.*, 141 Ariz. 544, 688 P.2d 170 (1984).

38. Claims based on oral representations made to employees were litigated in 22 cases during 1984, with plaintiffs reaching the jury in seven cases. *Committee Report, supra* note 1, at 786. Successful cases include: *Kitzmiller v. Washington Post*, 115 L.R.R.M. (BNA) 3015 (D.D.C. 1984) (oral promise of lifetime employment); *Newfield v. Insurance Co. of the West*, 156 Cal. App. 3d 440, 203 Cal. Rptr. 9

other circumstances.⁴⁰

Washington has adopted this form of contract exception to the traditional at will rule.⁴¹ In *Thompson*, the court noted that statements contained in policy manuals or employee handbooks could create an implied contract to terminate only for cause.⁴² The court explained that a given statement would be evaluated according to the principles of contract formation: offer, acceptance and consideration.⁴³ While the court did not identify the consideration necessary to support the employer's promise, it cited with approval cases holding that consideration is not a prerequisite to an implied employment contract.⁴⁴ Thus, the court appeared to relax the traditional bargained-for exchange requirement.

Promissory estoppel provides a second basis for implying an employment contract. In *Thompson*, for example, the court stated that an employer

(1984) (representation of permanent career); *Toshiba Am., Inc. v. Simmons*, 104 A.D.2d 649, 480 N.Y.S.2d 28 (1984) (oral promise of job security).

39. See *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984). (Although employment was at will, "[t]he [stock opinion] agreement defined the employment relationship."). Commentators have suggested that statements in such deferred compensation plans may form an implied employment contract. See, e.g., W. HOLLOWAY & M. LEECH, *supra* note 12, at 100-04.

40. See, e.g., *Gaulden v. Emerson Elec. Co.*, 284 Ark. 149, 680 S.W.2d 92 (1984) (employment application); *Shipley v. Herman Grant Co.*, 673 S.W.2d 149 (Tenn. Ct. App. 1983) (statements in corporate minutes).

41. *Thompson*, 102 Wn. 2d at 228-29, 685 P.2d at 1087. The contract exception has had a history of ebb and flow in Washington. As early as 1955, the court recognized that statements made to employees could, if supported by consideration, create an employment contract. *Lasser v. Grunbaum Bros. Furniture*, 46 Wn. 2d 408, 281 P.2d 832 (1955). Ten years later, however, the court expressly affirmed the at will rule, holding that an employment contract must be supported by consideration in addition to the labor services performed. *Webster v. Schauble*, 65 Wn. 2d 849, 400 P.2d 292 (1965). In *Roberts v. ARCO*, 88 Wn. 2d 887, 568 P.2d 764 (1977), the court first embraced the implied employment contract concept. The court stated that whether an employment agreement could be implied was not governed by consideration and mutuality of obligation, but by the parties' intent, business custom, the type of employment and the totality of the circumstances.

Whatever protection was given employees in *Roberts*, was quickly eliminated by *Parker v. United Airlines*, 32 Wn. App. 722, 649 P.2d 181 (1982). In *Parker*, the court refused to imply an employment agreement despite express promises by the corporate president that employees would be treated fairly and terminated only for cause. Under *Parker*, an employee apparently had to prove that the employer subjectively intended to provide just cause protection.

Thompson was intended to change the analysis of *Parker* and allow courts to imply employment agreements. The court of appeals, however, has given *Thompson* a narrow reading and has affirmed dismissal of the employee's complaint in the only appellate decisions after *Thompson*. *Armstrong v. Richland Clinic*, 42 Wn. App. 181; *Heriot v. United Airlines*, Civ. No. 13672-I-I (Wn. Ct. App. March 28, 1986). In both cases the court found that the evidence established only the employee's subjective understanding of an employment agreement which was insufficient to imply an agreement. Accordingly, both courts affirmed the successful motions to dismiss.

42. *Thompson*, 102 Wn. 2d at 228-29; 685 P.2d at 1087.

43. *Id.*

44. *Id.* The court cited 10 cases in support of the implied contract exception. In all 10 cases cited, the court held that consideration in addition to labor service was not a prerequisite to an employment contract.

may be bound to promises of specific treatment in specific situations.⁴⁵ The court explained that employers frequently issue employee oriented materials to create an atmosphere of fair treatment and job security.⁴⁶ Employees justifiably rely on these materials in deciding whether to accept or remain on a job.⁴⁷ Since the promises are designed to induce this reliance, the employer's promises will be enforced.⁴⁸

3. *Implied Covenant of Good Faith and Fair Dealing*

The implied covenant exception is the most recent and least approved exception to the traditional rule.⁴⁹ Under this theory, there is an implied covenant of good faith and fair dealing in every employment relationship.⁵⁰ There need not be an employment contract; rather, whenever an employee is terminated, the court examines the employer's good faith and fair dealing on a case-by-case basis. If an employee is terminated without just cause, the employer has not acted in good faith, and the termination is wrongful.⁵¹

Washington rejected the implied covenant exception in *Thompson*.⁵² The court reasoned that this approach gave insufficient consideration to an employer's interest in managing its business and would "subject each discharge to judicial incursions into the amorphous concept of bad faith."⁵³ The court feared that judicial examination of the circumstances surrounding each employee's termination would cause employers to act inefficiently, consume enormous resources, and unduly clog the judicial system.⁵⁴ The court also noted that such a radical change was best left for the legislative process.⁵⁵

45. *Id.* For a general discussion of the promissory estoppel theory, see Wald & Wolf, *supra* note 7. Promissory estoppel was raised in 13 cases reported during 1984 and plaintiffs were successful in establishing an employment contract in eight of those cases. *Committee Report, supra* note 1.

46. *Thompson*, 102 Wn. 2d at 230, 685 P.2d at 1088.

47. *Id.*

48. *Id.*

49. Only 5 states, Alaska, California, Massachusetts, Michigan, and Montana, have adopted this exception. Strasser, *supra* note 7. The implied covenant exception was raised in 40 cases reported in 1984 and plaintiffs succeeded in only 13 of these cases. Moreover, all states considering this exception for the first time in 1984 rejected it. *Committee Report, supra* note 1.

50. *Cleary v. American Airlines*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). Under this theory, factors such as an employee's longevity and the employer's failure to follow established procedure for termination may establish the employer's bad faith in its termination decision.

51. See, e.g., *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). Under California law, if a termination is undertaken for reasons other than the employee's performance deficiencies and with an intent to deprive the employee of the benefits of the implied employment contract, the termination will be in bad faith. *Khanna v. Microdata Corp.*, 170 Cal. App. 3d 266, 215 Cal. Rptr. 860 (1985).

52. *Thompson*, 102 Wn. 2d at 227, 685 P.2d at 1086.

53. *Id.*

54. *Id.*

55. *Id.*

C. Remedies for Wrongful Termination

When fashioning a remedy for wrongfully terminated employees, a court can use either the remedy traditionally associated with the underlying form of action (contract or tort) or adopt the "make whole" approach used in traditional labor relations actions. Each scheme, however, adopts the remedy from the analogous cause of action, without specifically considering the needs of the employer and employee.

The most frequently used remedial scheme tracks the underlying theory of the action.⁵⁶ If the action is for breach of contract, the employee is entitled to monetary damages; in other words, lost earnings.⁵⁷ Consequential damages, such as injury to reputation, are not available.⁵⁸ Reinstatement is viewed as specific performance, and is not available unless circumstances render a damage remedy inadequate.⁵⁹

If the action is in tort, as with a discharge in violation of public policy, the full range of tort damages may be available.⁶⁰ Moreover, in some jurisdictions, breach of an employment contract is also a tort, thus making the tort damages available in contract actions as well.⁶¹

Fewer courts follow the "make whole" approach derived from traditional labor law in which reinstatement is the normal remedy.⁶² The goal is

56. Relatively few reported wrongful termination decisions explicitly discuss the appropriate remedy. The measures of damages, however, "is a function of the theory of liability, i.e. whether contract, tort, status or statutory." W. HOLLOWAY & M. LEECH, *supra* note 9, at 398-99. For an overview of the principles generally applied in wrongful termination remedies, see *id.* at 397-421.

57. *Id.* at 473-84 (methodology for calculating lost earnings).

58. Consequential damages are subject to the same foreseeability limitation present in a traditional breach of contract action. See *Valentine v. General Am. Credit*, 123 Mich. App. 521, 332 N.W.2d 591 (1978), *aff'd*, 420 Mich. 256, 362 N.W.2d 628 (1984) (consequential and punitive damages unavailable in a contract action unless an independent tort is established); *Gunsolley v. Bushby*, 19 Or. App. 884, 529 P.2d 950 (1974).

59. W. HOLLOWAY & M. LEECH, *supra* note 9, at 410. "There is an almost universally recognized bar to the exercise of a court's equitable power to reinstate an employee . . . if the purpose is to provide monetary relief." In unusual circumstances, courts have granted reinstatement as a remedy. See, e.g., *Ezekial v. Winkley*, 20 Cal. 3d 267, 142 Cal. Rptr. 418, 572 P.2d 32 (1977) (reinstatement appropriate for surgical intern because damages, loss of professional status, could not be measured); *Duval v. Severson*, 15 Ill. App. 3d 634, 304 N.E.2d 747 (1973) (reinstatement of a co-owner of a small business appropriate to protect capital investment which would otherwise be lost).

60. To recover for emotional distress, the emotional injury must have a physical manifestation, or be intended by the employer. W. HOLLOWAY & M. LEECH, *supra* note 9, at 404. For cases in which such injuries were compensable, see, *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *Sea-Land Serv., Inc. v. O'Neal*, 224 Va. 343, 297 S.E.2d 647 (1982).

Punitive damages are also available if the discharge was with fraud, actual malice, deliberate violence, or wanton disregard of the employee's rights. *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353, 359 (1978).

61. See W. PROSSER & P. KEETON, *THE LAW OF TORTS* § 92 (5th ed. 1984). At least two jurisdictions, California and Michigan, follow this rule. See, e.g., *Chamberlain v. Bissell*, 547 F. Supp. 1067 (W.D. Mich 1980); *Smithers v. Metro-Goldwyn-Mayer Studios*, 139 Cal. App. 3d 643, 189 Cal. Rptr. 20 (1983).

62. See *Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983). While Wisconsin

to place the employee in the same position he or she would have been without the employer's unlawful act. Thus, the employer must offer to return the employee to work, and make compensation for any wages or benefits lost as a result of the termination.⁶³ Courts adopting this approach view wrongful termination actions as closely analogous to violations of employee protective statutes and reason that the remedies should be analogous as well.⁶⁴

In Washington, no reported decision explicitly describes the appropriate remedy for a wrongfully terminated employee. The theory in *Thompson*, however, was based on common law, not statutory causes of action. One might infer, therefore, that Washington would adopt a remedial scheme based on the form of the underlying claim.

II. DEFICIENCIES IN THE COMMON LAW APPROACH

While each common law exception to the doctrine of employment at will offers some protection to employees, all exceptions recognized in Washington suffer from analytical and practical difficulties. A statutory approach, in contrast, can eliminate these deficiencies and better balance the competing interests.

The public policy approach protects only those employees whose discharge violates a judicially or legislatively recognized public policy. If the motivation for the discharge does not fit this category, no cause of action will lie.⁶⁵ Since this exception covers only the most outrageous employer conduct, it offers minimal protection to employees. In addition to its limited application, this approach suffers from many of the difficulties discussed below.

The implied contract exception, while enjoying a wider application, still fails to properly balance the needs of employers, employees, and the public at large. Although this exception often is hailed as providing job security for employees, the protection offered is largely illusory. The employer retains control over any offers or promises made to employees. A sophisticated

is the only jurisdiction expressly adopting this rule, other states may have started along this path. For example, in *Kurle v. Evangelical Hosp. Ass'n*, 89 Ill. App. 3d 45, 411 N.E.2d 326, 333 (1980), the court noted that the statutory developments in labor relations have eviscerated the rule against reinstatement for wrongfully terminated employees. While this may foreshadow an increased willingness to reinstate employees in Illinois, such a willingness is not yet apparent. At least one commentator suggests that reinstatement is an appropriate remedy for all wrongfully terminated employees. D. DOBBS, REMEDIES § 12.25 (1980).

63. *Brockmeyer*, 335 N.W.2d at 841.

64. *Id.* Statutory remedies, reinstatement and backpay, were "the most appropriate remedies for public policy wrongful discharges since the primary concern is to make the employee whole." *Id.*

65. See *supra* notes 20-28 and accompanying text.

employer, therefore, may prevent an employment contract from being formed.⁶⁶ Personnel manuals and employee handbooks may be drafted to contain no guarantee of discharge solely for cause or promise of specific treatment in specific situations.⁶⁷ Supervisors and other management personnel may be instructed and trained to prevent any oral representations from creating an employment contract.⁶⁸ Thus, only the ignorant or unwitting employer will inadvertently create just cause protection for its employees.

Disclaimers offer employers another powerful method to prevent formation of employment contracts. In *Thompson*, the court specifically noted that if an employer stated, in a clear and conspicuous manner, that no representations were intended to create an employment contract, the disclaimer would defeat the formation of an employment contract.⁶⁹ Moreover, an employer may reserve the right to modify its employment practices at its discretion.⁷⁰ One might expect, therefore, that employer's would routinely include disclaimers in any communication to employees to prevent possible future liability.⁷¹

Once an employee establishes an implied contract, the employee must also establish that the employment contract was breached. Usually, a breach will occur if the employer lacked just cause to terminate the

66. A number of commentators have provided specific guidance to employers on how to prevent employment contracts from being formed. See, e.g., Decker, *At-Will Employment in Pennsylvania*, 87 DICK. L. REV. 477, 504-05 (1983); Lopatka, *supra* note 1, at 26-32; Moon, *Avoiding Liability for Wrongful Discharge—Management Planning and Litigation Tactics*, 62 MICH. B.J. 780, 781-83 (1983); Wald & Wolf, *supra* note 7, at 544-47.

67. Since the terms of the employee/employer communication control the existence of any employment contract and employers draft such communication, employers have complete control over the creation of any employment contract. For circumstances where proper drafting will avoid an employment agreement, see, e.g., *Thompson*, 102 Wn. 2d at 229, 685 P.2d at 1087 (conspicuous statement that employment manuals are general expressions of policy and not intended to be part of the employment relationship defeats an implied employment contract); *Novosel v. Sears Roebuck & Co.*, 495 F. Supp. 344 (E.D. Mich. 1980) (no implied employment contract where employment application expressly stated employment was at will).

68. See Earle & Coley, *New Protection for the Employee-At-Will*: *Toussaint v. Blue Cross & Blue Shield*, 62 MICH. B.J. 770, 773 (1983) (supervisory training is an important preventative measure for employers). Since employers are generally responsible for the acts of their supervisors, and supervisors have the most contact with employees, the importance of supervisory training can hardly be over-emphasized.

69. *Thompson*, 102 Wn. 2d at 232, 685 P.2d at 1089.

70. *Id.*

71. Some employers routinely place disclaimers in all communications to employees. While Sears' uniform disclaimer has generally prevented an employment contract from being formed, other employers have not fared as well. Compare *Reid v. Sears Roebuck & Co.*, 588 F. Supp. 558 (E.D. Mich. 1984) and *Luft v. Sears, Roebuck & Co.*, 117 L.R.R.M. (BNA) 2704 (Iowa 1984) (disclaimer established at will relationship) with *Tiranno v. Sears Roebuck & Co.*, 99 A.D.2d 675, 472 N.Y.S.2d 49 (1984) (disclaimer negates any oral representation but employee handbook is an employment contract unaffected by disclaimer) and *McCauley v. Thygersen*, 732 F.2d 978 (D.C. Cir. 1984) (disclaimer ineffective to negate any representation made). See generally Lopatka, *supra* note 1, at 29-30.

employee.⁷² The court, therefore, must still take the “judicial incursion into the amorphous concept of bad faith”⁷³ to determine whether the termination was for cause.

If successful to this point, the employee must next confront economic reality. Wrongful termination litigation is fact intensive and requires extensive pretrial discovery.⁷⁴ There are likely to be several significant pretrial motions requiring briefing and argument.⁷⁵ Unless the employee’s damages are significant, cost considerations may preclude bringing meritorious cases. It is no surprise, therefore, that the reported decisions involve managerial, supervisory, or executive employees; the average hourly paid employee remains largely unprotected by current doctrine.

Wrongful termination litigation also presents several problems for employers.⁷⁶ First, if an employer faces the possibility of litigation whenever an employee is terminated, that employer will be less likely to terminate employees.⁷⁷ To operate efficiently, employees must be hired and fired as economic considerations and job performances dictate. Of course, efficiency may be affected any time an employer’s discretion is limited, and efficiency does not, in and of itself, suggest that employers should enjoy complete freedom in personnel decisions. It is, however, a cost which should be considered when providing just cause protection to employees.

A second employer problem concerns the appropriate remedy. Where tort damages are available, an employer may be liable for a wide range of emotional damages.⁷⁸ An employer may also face substantial punitive damages.⁷⁹ Where such damages are compensable, the award for a single

72. A breach also may occur if the employment contract specifies pretermination procedures and the employer fails to follow those procedures.

73. *Thompson*, 102 Wn. 2d at 227, 685 P.2d at 1086.

74. See Moon, *supra* note 66 at 783; Palefsky, *Wrongful Termination Litigation: “Dagwood” and Goliath*, 62 MICH. B.J. 776, 779 (1983) (discussing plaintiff and defendant discovery tactics).

75. Pretrial motions accounted for 78.8% of state decisions and 91.3% of federal decisions on wrongful termination reported during 1984. *Committee Report*, *supra* note 1, at 785.

76. Employers may face a conflict between this doctrine and the provisions of employee protective statutes. For example, if an employer creates an employee-staffed, internal grievance procedure to resolve wrongful termination claims, the employer may have promoted a labor organization in violation of the National Labor Relations Act. Similarly, a performance appraisal system designed to minimize any disparate impact may create an implied contract that any performance deficiencies will be noted in that appraisal. See, e.g., *Haslaam v. Pepsi-Cola Co.*, 117 L.R.R.M. (BNA) 2950 (Mich. 1984); *Chamberlain v. Bissel, Inc.*, 547 F. Supp. 1067 (W.D. Mich. 1982) (employee review procedure created an implied employment contract). Accordingly, employers must carefully examine the effects of any personnel policy on all aspects of labor relations.

77. Simple economics dictate this result. If an employee’s cost is greater than his production, the efficient act is to terminate the employee. If, however, the transaction costs of the termination are greater than the savings, the employer will not terminate the employee.

78. See *supra* note 60.

79. *McGrath v. Zenith Radio Corp.*, 651 F.2d 458 (7th Cir. 1981) (The trial court awarded \$1,000,000

termination may exceed \$1,000,000⁸⁰ and be significantly disproportional to the injury inflicted.

Reinstatement, where available, is another element of employer concern. Reinstated employees frequently lack any support group in the workplace, are susceptible to retaliatory treatment, and, as a result, tend to have low productivity and high turnover.⁸¹ Accordingly, reinstatement is not a favored remedy for wrongful terminations.⁸²

Finally, the contract exception creates several social costs. This exception injects a preliminary issue—whether an employment contract exists—into the analysis of the termination decision. Typically, the bulk of the litigation centers around this preliminary issue, with relatively little time spent on the just cause question.⁸³ Since the purpose is to provide job security to the employee, just cause, not whether a contract exists, is the important question. Thus, the resources spent on the preliminary contract question achieve little social gain.

More generally, one must consider whether litigation is an appropriate method to resolve wrongful termination disputes. Several factors counsel against litigation as the best dispute resolution procedure. First, courts often lack experience and training in labor relations matters.⁸⁴ Second, litigation unduly delays the recovery by a wrongfully terminated employee, a person who may not have an alternate source of income pending the resolution of the claim. Moreover, litigation is a very costly method to resolve these disputes. Finally, if even a fraction of the estimated 200,000

in compensatory and \$1,000,000 in punitive damages to a wrongfully terminated employee. On appeal, compensatory damages were reduced to \$300,000 but punitive damages were sustained.).

80. See, e.g., *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312 (9th Cir.), cert. denied, 459 U.S. 859 (1982) (\$1,900,000 million actual and punitive damages plus \$400,000 in attorneys fees to three wrongfully terminated executives); *McGrath v. Zenith Radio Corp.*, 651 F.2d 458 (7th Cir. 1981) (trial court award of \$2,000,000); *Chamberlin v. Bissell, Inc.*, 547 F. Supp. 1067 (W.D. Mich. 1980) (total damages \$1.1 million offset by employees comparative negligence).

81. Reinstatement is not an effective remedy in a nonunion setting. McDermott & Newhams, *Discharge-Reinstatement: What Happens Thereafter*, 24 INDUS. & LAB. REL. REV. 526 (1971); Ross, *The Arbitration Discharge Cases: What Happens After Reinstatement*, PROCEEDINGS OF THE 10TH ANNUAL MEETING OF THE NAT'L ACADEMY OF ARBITRATORS 21-56 (McKelvey ed. 1957).

82. See *supra* note 59.

83. See *supra* note 75. None of the cases involving pretrial motions reported during 1984 deal with the just cause issue. Instead, the decisions concern whether an employment agreement was established, whether the claim was preempted, or some other preliminary matter. See *Committee Report*, *supra* note 1, at 785. The delay while these pretrial motions are decided can be substantial. In *Thompson*, for example, the employee was terminated in July, 1980 and the employer was first compelled to answer interrogatories in July, 1984. 102 Wn.2d at 221, 685 P.2d at 1082.

84. The concern is not that courts are unable to decide labor relations issues, but that an arbitrator who wrestles with the issue of just cause every day is better equipped to examine just cause questions. See *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

employees terminated each year under questionable circumstances⁸⁵ sought legal relief, they would increase considerably the delays now present in the judicial system.

III. A PROPOSED ADMINISTRATIVE SYSTEM

A wrongful termination statute can be designed to serve the needs of both employers and employees. To do so, the statute must guarantee just cause protection to employees who have completed an initial probationary period.⁸⁶ This protection must be enforced through a prompt hearing with a decision required within a short, specified period of time. The employee's remedy would be limited to backpay; reinstatement and compensation for emotional distress would not be available. Backpay would accrue from the date of discharge until either the employee obtained alternate employment or a specified date in the future. To remain eligible for backpay, the employee must actively seek employment. If the employee prevails at the initial hearing, the employee must receive backpay immediately. The backpay would be paid out of a state-sponsored fund. While an employer may appeal the initial decision, the employer must reimburse the state for the backpay expense, if, after the appeals are exhausted, the termination was without just cause.

A statutory guarantee of just cause protection must co-exist with employee protective statutes as well as with collective bargaining agreements. Where the basis for an employee's wrongful termination claim is cognizable under the National Labor Relations Act, the state law wrongful termination claim is preempted.⁸⁷ Where unionized employees enjoy binding arbitration over discharge disputes, the employee may only proceed in a single forum at a time. As long as the employee's union grievance is being pursued, the employee's wrongful termination claim is preempted.⁸⁸ If the

85. The estimate comes from Peck, *supra* note 6, at 10. See also 121 Lab. Rel. Rep. No. 23 (BNA) (1982) at 24-25.

86. Probationary periods are widely recognized as effective screening devices to measure an employee's job performance. An employee serving a probationary period knows that he or she has few vested rights in that position and generally has made but a slight investment in training, foregone opportunities, and housing or other living arrangements.

87. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) (state regulation of activities arguably protected or arguably prohibited under section 7 or section 8 of the NLRA preempted). Preemption can arise in two ways. First, if deciding the wrongful termination claim requires interpreting the NLRA, the claim is preempted. See, e.g., *International Longshoremen's Ass'n v. Davis*, 106 S.Ct. 1904 (1986) (claim of fraud against union which assured supervisors that they could not be lawfully fired preempted since it requires resolving supervisory status under § 2(11) of the NLRA); *Viestenz v. Fleming Cos.*, 681 F.2d 699 (10th Cir.), *cert. denied*, 459 U.S. 972 (1982) (discharge for union organizing preempted by NLRA). Alternatively, if the terminated employee is covered by a collective bargaining agreement providing just cause protection, the wrongful discharge claim is preempted by section 301 of the NLRA. *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904 (1985).

88. "[W]hen resolution of a state-law claim is substantially dependent upon analysis of an agreement

union drops the grievance, the employee may then seek statutory relief.⁸⁹

Under such a system, employees receive prompt compensation for their losses. Employers, however, need not rehire terminated employees and face only a specific, limited penalty for the wrongful termination. Moreover, the cost of resolving wrongful termination claims, when compared with litigation, is substantially reduced. Accordingly, the essential interests of employers, as well as employees, are served.

A. *Just Cause Standard*

Just cause is, of course, a difficult concept to define. While labor arbitration has developed a substantial body of law interpreting what constitutes just cause for termination, labor arbitration is somewhat different from wrongful termination litigation.⁹⁰ Accordingly, while labor

made between the parties in a labor contract, that claim must either be treated as a § 301 claim, . . . or dismissed as pre-empted by federal labor-contract law." *Allis-Chalmers Corp.*, 105 S. Ct. at 1917. If the union contract contains just cause protection, the wrongful termination claim would require an analysis of that contract and would be preempted. See generally Wheeler & Browne, *Federal Preemption of State Wrongful Discharge Actions*, 8 INDUS. REL. L.J. 1 (1985).

89. If the union drops the employee's grievance, the employee has no other direct remedies under the collective bargaining agreement. The employee's only recourse is to file a duty of fair representation action under section 301 of the NLRA. In the section 301 action, the primary issue is whether the union's decision to dismiss the grievance was in bad faith. Whether the grievance was meritorious is a secondary issue. See, e.g., *Vaca v. Sipes*, 386 U.S. 171 (1967); *Ruzicka v. General Motors*, 649 F.2d 1207 (6th Cir. 1981).

This potential section 301 remedy should not preempt the employee's statutory wrongful termination action, although this result is not free from doubt. When employees covered by a collective bargaining agreement containing just cause protection file a wrongful termination suit, courts are split over whether employees must exhaust their contractual remedies. Compare *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981) and *Midgett v. Sackett-Chicago, Inc.*, 105 Ill.2d 143, 473 N.E.2d 1280 (1984), cert. denied, 106 S.Ct. 278 (1985) (exhaustion not required) with *McKiness v. Western Union Tel. Co.*, 667 S.W.2d 738 (Mo. App. 1984) (exhaustion required).

The better view is that exhaustion is not required unless the claim would also constitute an unfair labor practice. State statutes regulating labor relations are not preempted if they are merely peripherally related to the NLRA or touch interests so deeply rooted in local feeling and responsibility that it cannot be inferred that Congress deprived the states of the power to act. *Peabody*, 666 F.2d at 1315. If one may safely presume that deciding a wrongful termination claim even though the employee has not pursued the section 301 remedy ". . . will not disserve the interests promoted by the federal labor statutes," then the claim is not preempted. *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).

The statute proposed herein falls within these principles. The statute reflects a state decision that all employees are entitled to contest their termination. This statutory wrongful termination action does not require determining the union's reason for dropping the grievance. As such, permitting the wrongful termination action is merely peripherally related to section 301. Accordingly, the wrongful termination claim should not be preempted.

Of course, if the wrongful termination claim involved matters arguably protected or arguably prohibited by section 7 or section 8 of the NLRA, the claim would be preempted under the *Garmon* doctrine. See *supra*, note 87.

90. A labor arbitrator analyzes a termination under a specific contractual test. This analysis requires balancing the severity of the employee's transgression with the principles of corrective discipline and the punishment given. The arbitrator has a wide variety of remedial tools with which to make the balance. In

arbitration decisions may provide a useful starting place to define just cause in the wrongful termination context, just cause must be analyzed independently.

There are two elements of proof in a wrongful termination claim: proof of wrongdoing, and proof that the wrongdoing justified termination.⁹¹ An employee is not terminated for cause if either the employee did not commit the infraction causing the termination, or the employee could not be expected to foresee that committing the infraction would lead to termination.

Whether an employee committed a given infraction is primarily a question of fact. On this factual issue, the employer should bear the burden of proof.⁹² Proof should be by a preponderance of evidence.⁹³

Proof that the employee committed the conduct in question does not itself establish that the termination was for cause. The conduct also must either be prohibited by a work rule, or be such that a reasonable employee would recognize that it might result in termination.⁹⁴ The latter could occur in two ways. First, certain conduct, such as theft, intoxication, or assault, is widely recognized as grounds for immediate termination.⁹⁵ Second, the employer may have an unwritten, but widely recognized and consistently enforced policy of termination for a given offense.⁹⁶ If such a policy exists, then employees have sufficient notice of the consequences of their conduct, and act at their peril.

contrast, a wrongful termination claim offers no flexibility in remedy; the employee receives either full backpay or nothing at all. The opportunity to fine-tune the appropriate discipline is eliminated.

91. F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 661 (4th ed. 1985).

92. Placing the burden of proof on the employer is justified for two reasons. First, the employer has superior access to the facts surrounding the termination. Second, if the employee bore the burden, the employee would be in the untenable position of proving a negative. For these reasons, the employer generally bears the burden of proof in labor arbitration. F. ELKOURI & E. ELKOURI, *supra* note 91, at 661-63. In wrongful termination statutes in other countries, the employer bears the burden of proving a legitimate reason for the discharge. Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 AM. J. COMP. L. 310, 313 (1985).

Since wrongful termination claims under the proposed statute do not depend on the employer having a discriminatory motive, the alternating burden analysis used in Title VII and NLRA cases to determine the employer's motivation is inapplicable. *See* NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) (NLRA); *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) (Title VII).

93. Since the wrongful termination claim would not be based on a private agreement, but on a civil statute, proof should be by a preponderance of evidence. In contrast, the standard of proof is an unsettled issue in labor arbitration with significant variation from arbitrator to arbitrator. F. ELKOURI & E. ELKOURI, *supra* note 91, at 661.

94. *Overhead Door Co. v. United Bhd. of Carpenters & Joiners, Local 1299*, 70 Lab. Arb. (BNA) 1299, 1301 (1978) (Dworkin, Arb.); *Koppas Co. v. International Ass'n of Machinists & Aerospace Workers*, 69 Lab. Arb. (BNA) 613, 614 (1977) (Harkless, Arb.).

95. *Hilo Coast Processing Co. v. International Longshoremen's & Warehousemen's Union, Local 142*, 74 Lab. Arb. (BNA) 236, 240 (1980) (Tanaka, Arb.) (discharge for threatening a fellow employee upheld against claim it was condoned by management: "[I]t would be unreasonable for any employee to believe that fighting or the threatening of fellow employees are those types of acts which would ever be condoned by management.").

96. F. ELKOURI & E. ELKOURI, *supra* note 91, at 683.

Employers also may specify prohibited conduct in work rules. It is well-settled that employers have a fundamental right to unilaterally establish reasonable plant rules.⁹⁷ A plant rule is reasonable if it is reasonably related to a legitimate management objective.⁹⁸ Plant rules must be widely disseminated to employees to provide notice of what conduct is forbidden.⁹⁹ These rules must also be enforced in a consistent and nondiscriminatory manner. While neither absolute consistency nor slavish adherence to procedure is required, if an employer's enforcement practices would cause a reasonable employee to view the conduct in question as sanctioned by management or subject to lesser discipline, then discharge for such conduct is without just cause.¹⁰⁰

B. Administration

This proposal for protection from unjust termination can be adopted in Washington without creating a new administrative agency. The Department of Employment Security can readily enforce the proposed statutory scheme with only minor modifications to its existing procedure.¹⁰¹

Currently, when employees are terminated, they are eligible for unemployment compensation unless they are terminated for misconduct.¹⁰² Misconduct is not equivalent to just cause.¹⁰³ The Department investigates the employee's claim for compensation and holds hearings on contested claims.¹⁰⁴ If an employee is determined eligible for benefits, the benefits

97. *Id.*, at 553. "It is well established . . . that management has the fundamental right unilaterally to establish reasonable plant rules not inconsistent with law"

98. "The test of reasonableness of a rule is not measured by counting the number of times the problem arises which it is designed to guard against. The test is whether or not the rule is reasonably related to a legitimate objective of management" *Robertshaw Controls Co. v. United Auto., Aerospace & Agricultural Implement Workers*, 55 Lab. Arb. (BNA) 283, 286 (1970) (Block, Arb.).

99. "[A] reasonable rule must be one which the employees can understand and comply with." *Hoover Co. v. International Bhd. of Elec. Workers*, 77 Lab. Arb. (BNA) 1287, 1290 (1982) (Strasshofer, Arb.).

100. See *Heriot v. United Airlines*, Civ. No. 13672-I-I (Wash. Ct. App. March 28, 1986) (substantial compliance with pretermination procedure satisfies an employer's contractual obligation to the terminated employee). In arbitration law, the test is whether the employer's lax enforcement of the rules would cause a reasonable employee to believe the conduct was condoned by management. F. ELKOURI & E. ELKOURI, *supra* note 91, at 683-84.

101. See *infra* note 109 and accompanying text; cf. Bellace, *A Right of Fair Dismissal: Enforcing a Statutory Guarantee*, 16 U. MICH. J.L. REF. 207, 231-47 (1983) (a related suggestion for a wrongful termination statute with administrative enforcement, with particular application to Pennsylvania law).

102. WASH. REV. CODE § 50.20.060 (1985).

103. Misconduct is defined as conduct which is related to the employee's work, harmed the employer's interest, violated a work rule or policy, and was done with the intent or knowledge that the employer's interests would suffer. *Ciskie v. Department of Employment Security*, 35 Wn. App. 72, 664 P.2d 1318 (1983).

104. WASH. REV. CODE. §§ 50.32.010-.160 (1985).

are paid out of a state fund, funded by employer contributions.¹⁰⁵ To remain eligible for benefits, the employee must actively seek work.¹⁰⁶ The Department monitors the employee's work search and assists the employee in finding employment.¹⁰⁷ If the employee finds employment or leaves the labor market, eligibility for benefits ends.¹⁰⁸

The present unemployment compensation procedure may be easily modified to enforce a guarantee of just cause protection. First, the legislature should enact a statute preventing the termination of employees without just cause, to be enforced by the Department of Employment Security.¹⁰⁹ If an employee was terminated for cause, but not for misconduct, he or she would be entitled to currently existing unemployment benefits. If, however, the employee was terminated without cause, and therefore not for misconduct, he or she would receive, in addition to existing benefits, compensation such that total weekly benefits would equal the average pretermination weekly income. The employer would be liable to the state for the additional benefits paid as a result of the termination without cause. The duration of benefits, as well as the procedure to remain eligible for benefits, would remain unchanged.

IV. THE NEED FOR AN ADMINISTRATIVE APPROACH TO WRONGFUL TERMINATION CLAIMS

A statutory approach to wrongful termination cannot succeed simply on its own merits: it will require political support as well. Commentators have suggested that unorganized employees, the statute's primary beneficiaries, lack the political power to enact such a statute.¹¹⁰ Thus, until courts began to modify the doctrine of employment at will, suggestions that a statutory approach was preferable went unheeded.¹¹¹ As that doctrine becomes

105. WASH. ADMIN. CODE. § 192-12-040 (1985).

106. WASH. REV. CODE. § 50.20.010 (1985). If an employee imposes severe restrictions on the type of work they will accept, they are not "available" for work. *Arima v. Department of Employment Security*, 29 Wn. App. 344, 628 P.2d 500 (1981).

107. WASH. REV. CODE § 50.22.020(5) (1985).

108. *Id.*

109. The Department will, of course, require additional funding to implement this statute. The Department also must hire and train the arbitrators.

110. See *Blades*, *supra* note 4; *Peck*, *supra* note 6. Statutes protecting "whistleblowers" from retaliatory discharge and prohibiting employers from subjecting employees to a polygraph examination have, however, been enacted in recent years. See, e.g., CONN. GEN. STAT. ANN. § 31-51m (West 1983); ME. REV. STAT. ANN. Title 26 §§ 831-39 (1983); MICH. COMP. LAWS §§ 15.361-15.369 (1981) ("whistleblower" statutes); WASH. REV. CODE § 49.44.120 (1985) (polygraph). For a comprehensive list of all state employee protective statutes, see W. HOLLOWAY & M. LEECH, *supra* note 9, at 430-62. These statutes, while not as far-reaching as the one proposed herein, involve similar political power concerns.

111. The first suggestion for a wrongful termination statute was in 1976 and has gone unheeded. *Summers*, *supra* note 6.

increasingly eroded, employers and unions should rethink their opposition to a wrongful termination statute. Upon such reflection, they may conclude that a statute like the one proposed herein is in their best interests.

A. *Employer Interests*

Employers have typically opposed just cause protection on economic grounds; it was thought to be simply too expensive. Today, however, an employer's choice is not whether the traditional doctrine should be modified, but how that modification will occur. When considering the judicial modification model, employers might consider the California example. Two recent surveys of California superior court decisions reveal that plaintiffs in wrongful termination litigation prevail in 90–95% of the cases with an average judgment of \$450,000 to \$548,000.¹¹² While this data has a statistical bias,¹¹³ it should provide incentive for employers to consider an alternate method to resolve wrongful termination disputes.

To be sure, most states have not followed California's lead, and some may never do so. Thus, employers may be tempted to wait until a given state has developed extensive wrongful termination remedies before considering other dispute resolution procedures. That delay, however, might prove counterproductive. As the remedies for wrongfully terminated employees grow, so will the organized bar representing those employees.¹¹⁴ As an organized plaintiffs' bar develops, so will opposition to alternate forms of dispute resolution and limits on a plaintiff's recovery.¹¹⁵ The plaintiffs' employment bar currently is largely unorganized, widely dispersed, and is unlikely to block or delay a wrongful termination statute.

Moreover, employers should act now to strike a better bargain than may be available after employees enjoy greater protection in the courts. Certainly, any wrongful termination statute will limit traditional employer's powers. If these powers will be usurped eventually, employers would be

112. Lopatka, *supra* note 1, at 3 (citing studies by the law firm of Orrick, Herring & Sutcliff and by Fredrick Brown, a San Francisco management lawyer).

113. The data suffer from two significant biases. First, only the high damage cases are likely to go to trial given the cost of litigating a wrongful termination case. This tends to skew the average judgment figure. Moreover, cases where the employer has a strong defense are likely to be resolved by a pretrial motion. Since juries are generally more favorably disposed to wrongful termination actions than are judges, this tends to skew the plaintiff's success rate. *See* Palefsky, *supra* note 74, at 776.

114. A national organization, the Plaintiff Employment Lawyers' Association, has recently been formed to aid attorneys who represent employees. This organization, however, currently has only 160 members. As the organizer of PELA noted, "plaintiffs' attorneys who represent employees are few in number and are scattered throughout the country." "PELA" *Network for Plaintiff Employees*, 121 Lab Rel. Rep. (BNA) 202 (1986).

115. The recent debate on product liability and tort reform exemplifies this phenomenon. The Trial Lawyers Association has spent substantial time and money in an effort to block or delay changes which would limit the rights and remedies of personal injury plaintiffs.

wise to exchange their current, although temporary, power for a long-term solution.

Finally, the European experience with wrongful termination statutes suggests that the burden placed on employers may be slight.¹¹⁶ Under Great Britain's statute, for example, the median recovery by a wrongfully terminated employee is approximately \$500, and 75% of all awards are for less than \$1000.¹¹⁷ Moreover, none of the countries with such legislation have experienced any effort by employers to alter or eliminate such legislation.¹¹⁸ Thus, while one might believe that a wrongful termination statute would place intolerable burdens on employers, experience under such statutes establishes otherwise.

B. Union Interests

Unions also are seen as major opponents of wrongful termination legislation. Under the traditional view, a union's primary selling point in organizational campaigns is job security and a grievance procedure. Once employees are afforded just cause protection by statute, they will no longer need a union.¹¹⁹ This analysis, however, overlooks the experience in countries with wrongful termination statutes as well as the range of services employees receive from a union. When these factors are considered, it is likely such legislation will help, rather than hinder, union organizing drives.

In most European nations, wrongful termination statutes coexist with healthy labor organizations.¹²⁰ Indeed, European union leaders frequently cite these statutes as an aid in their organizing efforts.¹²¹ When unor-

116. See generally Estreicher, *supra* note 92. Canada also protects employees who have been employed by an employer for one year and are not covered by a collective bargaining agreement from wrongful termination. The experience under the Canadian wrongful termination statute is discussed in England, *Unjust Dismissal in the Federal Jurisdiction: The First Three Years*, 16 MANITOBA. L.J. 9 (1982).

117. Sherman, *Reinstatement as a Remedy for Unfair Dismissal in Common Market Countries*, 29 AM. J. OF COMP. LAW 467, 504 (1981). Employers won 72.3% of all cases decided in Britain during 1978. Moreover, while reinstatement is a potential remedy, "in actual practice no Common Market country requires employers to reinstate most of the employees who are found by a government body . . . to have been unfairly dismissed." *Id.* at 507.

118. *Id.* But see Wall St. J., April 20, 1983, at 6, col. 2 noting the widespread dissatisfaction with the Portuguese wrongful termination statute. This statute requires judicial determination of wrongful terminations and provides reinstatement and backpay for wrongfully terminated employees. The primary complaints have been the delay and cost of judicial determinations and employer's dissatisfaction with reinstated employees. Those problems would not be present under the statute proposed herein.

119. Blades, *supra* note 4, at 1434 n.140; Minda, *The Common Law of Employment At Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939, 943 (1985).

120. Estreicher, *supra* note 92; Sherman, *supra* note 117.

121. See J. STIEBER & J. BLACKBURN, PROTECTING UNORGANIZED EMPLOYEES AGAINST UNJUST DISCHARGE 65 (1983) (remarks of R. Coulson); 121 Lab. Rel. Rep. No.23 at 18 (BNA) (1982) ("Unions

ganized employees challenge an employer's termination decision, employees generally learn what rights they have and why those rights need protection.¹²² Moreover, in contesting the employer's decision, employees often find that they need assistance in investigating and presenting the underlying facts involved. This assistance is frequently provided by the union.¹²³ When employees learn of this assistance, they become more likely to seek union representation.¹²⁴

A similar result may follow from the proposed statutory scheme. The statute only protects employees from wrongful termination; it contains no protection against lesser discipline, selection for promotions, work assignments, or other matters typically regulated in a collective bargaining agreement. Furthermore, while the employee is not guaranteed a representative at the hearing on the termination, the union could provide representation upon request. While representing the employee, the union could explain the benefits offered by unionization. If the benefits are sufficient, the employees may select union representation. In this fashion, the proposed statute could aid, rather than injure, labor organizations.

C. *Employee Interests*

From the employee's view, the fundamental tradeoff is a limited damage remedy in exchange for broad coverage and speedy dispute resolution. This tradeoff should prove satisfactory for most employees.

First, consider the employee's loss from termination. During the course of employment, employees develop specialized training and skills: their "human capital." This capital takes two forms, general and firm-specific. General capital includes any skill which may be transferred to another employer, while specific capital is a skill useful for only a single employer, such as training on an individualized machine.¹²⁵ Thus, the employee's economic loss is limited to that human capital which cannot be transferred to another employer. This loss is likely to be small, as most terminated

. . . have had considerable organizing success after they assisted employees who were wrongfully discharged in winning their jobs back").

122. See England, *supra* note 116; Estreicher, *supra* note 92.

123. In Britain, for example, approximately sixty per cent of employees challenging their termination are represented at the hearing. Of this number, about thirty-seven per cent are represented by counsel; the rest are represented by a union representative. J. STEIBER & J. BLACKBURN, *supra* note 121, at 77. In West Germany, union frequently represent nonunion employees challenging their termination before the Works Council. *Id.* at 78.

124. In Britain, for example, union membership rose 25% after wrongful termination legislation was passed. *Id.* at 48.

125. The term "human capital" comes from the work of labor economists. According to traditional labor economics, employees acquire job skills ("human capital") primarily in their youth and receive a return on this capital throughout their working years. See generally G. BECKER, HUMAN CAPITAL (2d ed. 1970).

employees find replacement employment at the same or a greater wage within a relatively short period of time.¹²⁶

Termination also has a psychological impact on the terminated employee. This psychological trauma may manifest itself through a variety of psychological symptoms.¹²⁷ Yet the psychological trauma, like the economic effects, are limited in scope and duration.¹²⁸ Moreover, the trauma is caused by both the loss of income, and the act of the termination.¹²⁹ If a wrongfully terminated employee faces no imminent shortage of money, the psychological effects of termination will be further reduced.

It has been frequently suggested that legislatures will not protect employees against unjust dismissal because no organized political group would lobby for such legislation.¹³⁰ In the past ten years, however, state courts have adopted a patchwork of exceptions to the traditional rule of employment at will. In some states, these exceptions expose employers to significant liability for terminating an employee.¹³¹ Accordingly, employers, as well as employees, now may have an interest in supporting wrongful termination legislation. Indeed, wrongful dismissal legislation has been proposed in five states.¹³² Moreover, the national labor bar soon will be

126. In the first nine months of 1986, 84.5% of unemployed workers found satisfactory alternate employment in six months or less. In 1984 and 1985, the corresponding percentages were 80.9% and 76.1% N.Y. Times, October 11, 1986, at 13, col.1.

127. Courts have frequently recognized that terminated employees may suffer emotional distress. *See, e.g., Eklund v. Vincent Brass & Aluminum*, 351 N.W.2d 371, 379 (Minn. Ct. App. 1984) (all terminated employees may be expected to suffer some mental distress). To recover for such injuries, the employee generally must show either that the termination was vindictive or that the mental distress was unusually great. *See W. HOLLOWAY & M. LEECH, supra* note 9, at 215-18. The most common forms of mental distress alleged are caused by financial pressures, lost status, self doubt, and trauma associated with a job search under unpleasant conditions. *Id.*

128. *See W. HOLLOWAY & M. LEECH, supra* note 9, at 215-18.

129. *Id.*

130. *See supra* note 110.

131. *See supra* notes 60, 80.

132. California Assembly Bill 3017 (1984); Connecticut Committee Bill 8738, Gen. Assembly Jan. Sess. (1973); Michigan H.R. 5892 (1982); New Jersey Assembly Bill 1832 (1980); Pennsylvania H.R. 1742 (1981). None of these bills were enacted.

In addition, the Washington State Bar Association Civil Rights Committee has drafted a wrongful termination statute for Washington. This statute provides just cause protection for all employees subject to four listed exceptions. Claims of wrongful termination are adjudicated through mandatory arbitration. The arbitrators are private parties, not state employees. As a remedy, an employee may recover all economic loss. Reinstatement is available as a remedy, but if the arbitrator finds that reinstatement will substantially impair the employer's business operations, the employee may receive future lost wages of up to three years time. Finally, this proposed statute preserves any common law actions the employee has, including common law wrongful termination claims as well as any other tort action available. Correspondence from Washington State Bar Association Civil Rights Committee (copy on file with the Washington Law Review).

holding hearings on proposed wrongful termination legislation.¹³³ Perhaps these groups have recognized that the time for a statute has now come.

Any wrongful termination statute must identify and balance the competing interests of employers and employees. This Comment suggests one method to provide essential protection to employees while minimizing the disruption to employers. Although a different balance may eventually be struck on some issues, this Comment provides a general framework to achieve that goal.

V. CONCLUSION

Over the past two decades, courts have created a variety of exceptions to the traditional doctrine of employment at will. These exceptions fall into three categories: public policy, contract, or implied covenant of good faith and fair dealing. Although these exceptions provide some protection to employees, the protection offered is largely illusory. Moreover, the current judicial remedies for wrongful termination often do not properly reflect the loss and may come too late to help the terminated employee.

In contrast, an administrative scheme to enforce a statutory guarantee of just cause protection more precisely balances the competing needs of employers and employees. It would provide needed job security for employees without unduly burdening employers. It would offer prompt compensation to wrongfully terminated employees at the time they need it most. An employer's potential liability will be limited and easily calculable before the employer takes action. In sum, the proposed administrative system can better serve employers, employees, and society at large.

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¹³³ *Committee Report*, *supra* note 1, at 783–85.